Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

George Vilven et al.,

complainants,

and

Air Canada Pilots Association,

respondent,

and

Air Canada

employer.

Board File: 28320-C
Neutral Citation: 2011 CIRB **587**
May 4, 2011

The above-cited complaint was considered by a panel of the Canada Industrial Relations Board (the Board) composed of Ms. Elizabeth MacPherson, Chairperson, and Messrs. Patrick J. Heinke and Daniel Charbonneau, Members. The Board had originally scheduled an oral hearing of this matter. However, during a case management teleconference conducted on January 14, 2011, the parties agreed that an oral hearing was not required and the Board could proceed on the basis of the written submissions they had filed. Accordingly, the Board exercised its discretion pursuant to section 16.1 of the *Canada Labour Code* (*Part I - Industrial Relations*) (the *Code*) to decide this matter without an oral hearing.

Counsel of Record

Mr. Raymond D. Hall, for Mr. George Vilven et al.,

Mr. Bruce A. Laughton, for the Air Canada Pilots Association,

Mr. Fred Headon and Ms. Rachelle Henderson, for Air Canada.

I–Nature of the Application

[1] On August 3, 2010, Mr. Raymond Hall filed a complaint against the Air Canada Pilots Association (ACPA or the union) on behalf of himself and 66 other pilots or former pilots of Air Canada (the employer), alleging that the union had violated section 37 of the *Code*. The complaint was amended on August 5, 2010 to add a further nine complainants.

[2] The complainants allege that the union acted in an arbitrary, discriminatory and bad faith manner when it took positions in legal proceedings before the Canadian Human Rights Tribunal (CHRT) and the Federal Court, and in contractual negotiations with the employer, that did not support or directly opposed the interests of the complainants and thereby breached its statutory duty to fairly represent the complainants.

[3] The complainants further allege that the union acted in an arbitrary, discriminatory and bad faith manner by entering into a Memorandum of Agreement with the employer that purported to create a new classification based on the age of the employee (over 60), the purpose of which was to deny or restrict these employees from many of the rights, privileges, working conditions and employment benefits contained in the collective agreement.

II–Background

[4] ACPA represents some 3,082 pilots at Air Canada. The collective agreement between ACPA and Air Canada incorporates by reference the terms of the pilots' pension plan, which establishes a mandatory retirement age of 60 for pilots-in-charge and first officers (collectively, pilots). Beginning in approximately 2004, a number of the complainants in this matter sought ACPA's assistance in

challenging the mandatory retirement provisions in the collective agreement and requested that grievances be filed on their behalf.

[5] Mr. George Vilven and Mr. Robert Neil Kelly are two of the complainants who were forced to retire from their positions when they reached 60 years of age. At the time of his retirement on September 1, 2003, Mr. Vilven was flying as a First Officer on an Airbus 340 aircraft. Mr. Kelly was flying as a Captain and Pilot-in-Command of an Airbus 340 when he retired on April 30, 2005. In addition to seeking the union's assistance in filing a grievance regarding the policy of mandatory retirement at age 60, Mr. Vilven and Mr. Kelly each filed separate complaints under the *Canadian Human Rights Act* (*CHRA*), alleging that Air Canada had discriminated against them on the basis of age; Mr. Kelly also filed a complaint against ACPA alleging contravention of the *CHRA*.

[6] The Canadian Human Rights Tribunal (CHRT) granted ACPA interested party status in the two complaints against Air Canada. The various grievances filed by the complainants were put in abeyance when the parties agreed to proceed to the CHRT.

[7] Subsequent to the filing of Mr. Vilven's and Mr. Kelly's complaints with the CHRT, the ACPA Master Executive Council (MEC) adopted a position supporting mandatory retirement at age 60. ACPA conducted a survey of its membership (Vote #72, April 28, 2006) to determine if ACPA members supported the MEC position. Of the 1,840 ACPA members who voted, 1,382 (75 %) voted in support of the MEC position.

[8] The CHRT initially dismissed the complaints (*Vilven* v. *Air Canada*, 2007 CHRT 36). Messrs. Vilven and Kelly sought judicial review and on April 9, 2009, the Federal Court allowed their applications and remitted their complaints back to the CHRT for redetermination (*Vilven* v. *Air Canada*, 2009 FC 367). On August 28, 2009, the CHRT found that the complaints were substantiated, but reserved judgment on the appropriate remedy (*Vilven* v. *Air Canada*, 2009 CHRT 24).

[9] On July 22, 2010, Air Canada and ACPA entered into a Memorandum of Agreement (the Interim MOA) which established interim arrangements for the reinstatement of Messrs. Vilven

and Kelly. The Interim MOA recognized that the arrangement was an interim one, subject to future Federal Court and CHRT decisions and/or a "global and permanent agreement" between the employer and the union to address pilots working beyond age 60. The Interim MOA provided that both Messrs. Vilven and Kelly would be reinstated to Air Canada's employ as Embraer First Officers at the Toronto base, that their compensation would be comprised of their monthly pension payments plus additional monthly payments as would be required to bring their rate to that of a B777 First Officer.

[10] As noted above, this section 37 complaint was filed on August 3, 2010. The CHRT subsequently issued its decision on remedy (*Vilven* v. *Air Canada*, 2010 CHRT 27, issued November 8, 2010). By letter dated January 12, 2011, Air Canada and ACPA agreed that this CHRT decision superseded the Interim MOA and that the Interim MOA was therefore null and void.

III–Positions of the Parties

A–The Complainants

[11] The complainants allege that ACPA's actions disclose a flagrant and arbitrary disregard for the legitimate interests of union members who wish to continue their employment after age 60. In this regard, the complainants state that, since at least 2004, the union failed to discharge its duty to give serious concern to the interests of older members, despite the fact that the consequence to the members (termination of their employment) was serious and the union was the sole agent entitled to address these issues with the employer on behalf of its members.

[12] The complainants allege that the union acted in an arbitrary manner when the MEC determined its position in respect of retirement at age 60 before conducting a membership vote and without providing the membership with any opportunity to submit opinions on the merits of the MEC's position. The complainants suggest that any vote that asks members if they favour a process that forces senior employees to terminate their employment is necessarily arbitrary when the outcome is based on the large number of voters who would benefit from this policy when compared with the number of those who would suffer.

[13] Additionally, the complainants argue that the selection and/or maintenance of a fixed age for termination of employment is, in and of itself, entirely arbitrary, as age bears no relation to the specific job characteristics required of an airline pilot. They allege that ACPA's involvement in litigation supporting the employer's termination of union members' employment at age 60 was arbitrary, and that ACPA acted in a discriminatory manner when it failed to represent the interests of members who were, or were about to be, subject to termination of employment on the basis of age and when it opposed the interests of these members by engaging in litigation before the CHRT and the Federal Court.

[14] Two of the complainants, Messrs. Vilven and Kelly, allege that ACPA's negotiation of an Interim MOA, applicable solely to them, was arbitrary as it imposed restrictions on only two of the members of the bargaining unit. They further allege that ACPA continued to arbitrarily publicly humiliate and excoriate them for asserting their rights under the collective agreement by making factually incorrect and defamatory statements about them. In their view, ACPA has actively engaged in a vengeful, retributive assault on their rights and dignity through legal proceedings in support of their termination of employment and the negotiation of arbitrary and discriminatory contractual restrictions.

[15] Messrs. Vilven and Kelly further allege that, by entering into the Interim MOA with the employer in July 2010, ACPA acted in a discriminatory manner, as this document created separate terms and conditions, applicable solely to them, which distinguish and severely limit their rights under the collective agreement. In particular, these complainants allege that the Interim MOA disregards their seniority bidding rights by assigning them to a position normally accorded to new-hire, entry-level pilots.

[16] The complainants argue that the Interim MOA is evidence of the flagrant breach by ACPA of its duty of fair representation, as it was negotiated and executed without any consultation with the two members of the bargaining unit who are subject to the adverse provision it contains. The complainants argue that the terms of the Interim MOA are punitive and that the union's intent in negotiating them can only have been to prejudice their rights and benefits in order to preserve or enhance the interests of other members of the bargaining unit. The complainants claim that the effect

of the Interim MOA was to create a chilling effect for any other bargaining unit members who wish to remain employed as a pilot beyond age 60.

[17] The complainants described a number of events that they suggest demonstrate ACPA's discriminatory conduct, including the ACPA Retirement Dinner in Winnipeg in June of 2006, at which an effigy of Mr. Vilven was mocked; the creation of an "Age 60 Legal Support Committee," which published a number of newsletters espousing ACPA's opposition to the interests of the complainants; ACPA's continued participation in legal proceedings opposing the complainants' interests; and the content of the Interim MOA, which the complainants allege was designed to punish and humiliate Mr. Vilven and Mr. Kelly for asserting their rights.

[18] Finally, the complainants allege that the above-described actions are also evidence of bad faith on ACPA's part. They suggest that ACPA demonstrated bad faith, not only by failing to represent the interests of certain of its members, but by supporting the position of the employer in litigation and in negotiations to restrict the benefits, rights and working conditions of pilots over age 60.

[19] The complainants note that, faced with similar conflicts between the interests of younger and older pilots, unions in other jurisdictions have taken a neutral position, in accordance with their duty to fairly represent the interests of all of their members.

[20] As remedy, the complainants are seeking:

> (1) An order that ACPA immediately cease and desist from participation in any and all litigation and/or negotiation with the employer, the intent or effect of which is to distinguish or support the interests of one group of its members, based on their age, in opposition to the interests of another group of its members, based on their age, save as expressly permitted within the Canadian Human Rights Benefits Regulations; and
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> (2) An [*sic*] declaration that the proposed Interim MOA announced by ACPA and Air Canada on July 23, 2010 creating a separate set of limited rights, conditions of employment and employment benefits under the collective agreement for Mr. Vilven and Mr. Kelly violates section 37 of the *Code* and therefore is of no force and effect.

B–ACPA

[21] The union argues that its decision to support the provisions of the collective agreement that impose mandatory retirement at age 60 was neither arbitrary, discriminatory nor taken in bad faith. It states that those provisions have been in place since 1981 and were negotiated in fulfillment of the union's duty as the certified bargaining agent. ACPA argues that the benefits in the collective agreement, including security of employment, certainty of advancement, salary increases and significant pension income and post retirement benefits are all tied to the seniority system protected by the agreement. The union argues that it chose mandatory retirement as a mechanism to distribute the benefits of seniority in a fair manner, as it ensures advancement for junior employees and allows pilots to plan for their retirement. Accordingly, ACPA has taken a considered position that the removal of the mandatory retirement provision would result in significant interference with the rights of others and has consistently defended this position.

[22] ACPA argues that the complainants have reaped the benefit of the mandatory retirement rule, as their careers were able to progress due to the mandatory retirement of the pilots senior to them in age and cannot now be heard to claim that the requirement is unfair. ACPA suggests that mandatory retirement must be seen in the context of a system that was designed to assign the responsibilities of being an Air Canada pilot over different stages in the pilot's career and that all pilots understand that they will share these benefits and burdens equally at the appropriate stages in their careers.

[23] ACPA explains that its decision to oppose the complainants before the CHRT and the Federal Court was based on a reasoned consideration of the state of the law as it existed prior to the CHRT decision of August 28, 2009, and argues that the union was entitled to rely on the considerable judicial authority that supported the position the union ultimately took. As well, in addition to Vote #72, taken in April 2006, the union consulted its membership on the subject on a number of occasions. In 2008, ACPA conducted a survey that revealed that 76% of the 2,176 pilots who responded wished to retain mandatory retirement at age 60. Another survey of 1,860 Air Canada pilots conducted in June 2010 showed that 78% of those responding supported retirement at age 60. ACPA also obtained a statistical analysis of the potential impacts of the elimination of mandatory retirement at age 60. This analysis found that the elimination of mandatory retirement would impose

a significant cost on pilots younger than age 60, as the delay in advancement to the higher paying positions would result in salary losses. ACPA argues that its decision was taken with due regard to the interests of the entire bargaining unit and submits that its actions in support of mandatory retirement were not arbitrary, discriminatory or in bad faith.

[24] With respect to the Interim MOA that ACPA negotiated with Air Canada governing the reinstatement of Messrs. Vilven and Kelly following the CHRT decision of August 2009, the union submits that it was merely fulfilling its duty to accommodate their return to the workplace. It argues that, in determining what is required to accommodate an employee, an employer and a union are given wide latitude to implement appropriate measures.

[25] In a subsequent submission, ACPA argued that, without the Interim MOA or an order from the CHRT, neither Mr. Vilven nor Mr. Kelly had any right to demand reinstatement with Air Canada under the terms of the collective agreement. ACPA suggests that it could simply have waited until the CHRT had issued its ruling on remedy and that it was not a violation of section 37 for it to have negotiated an appropriate interim arrangement.

[26] ACPA states that, in returning Messrs. Vilven and Kelly to the workplace, it had to take into account two critical facts: namely that Air Canada is required to comply with the standards established by the International Civil Aviation Organization (ICAO), which restrict the age of the pilot-in-command to those under age 65 (Mr. Vilven reached age 65 in August 2008 and Mr. Kelly in May 2010 and, as a result, would only be permitted to fly as First Officers); and that both pilots were already in receipt of pensions from Air Canada. As a result, the union negotiated an arrangement that, through a combination of pension and earnings, would provide them with an income equivalent to the highest paid First Officer position at Air Canada, the B777 First Officer.

[27] ACPA explains that the CHRT decision created a major upheaval to the existing seniority and compensation system and that the parties were faced with a requirement to either modify the collective agreement for all purposes or to reach an interim, "without prejudice" agreement. They chose the latter option given the fact that a judicial appeal was still pending.

[28] The union also argues that it had to balance the interests of the complainants with those of the other union members. Its objective was to provide the complainants with income equivalent to the highest paid First Officers, while leaving those positions available for employees who were not in receipt of pension income. ACPA submits that the terms contained in the Interim MOA are a legitimate compromise and argues that, because neither Messrs. Vilven or Kelly accepted the offer of reinstatement under the terms of the Interim MOA, their complaint is academic.

[29] The union also argues that portions of the complaint and the general remedy sought by the complainants is beyond the scope of a section 37 complaint, as that provision protects only an employee's rights under a collective agreement. Accordingly, ACPA submits that it had no obligation to assist the complainants with their complaints to the CHRT, and that, as a respondent in those proceedings, it had the right to defend itself. ACPA also argues that the Board should not extend the protections of section 37 of the *Code* to complainants who have retired and who are in receipt of pension benefits, as those individuals are no longer in the bargaining unit and the union has no duty to represent them.

[30] ACPA argues that many portions of the complaint are untimely, given the 90-day time limit provided in section 97(2) of the *Code* for the filing of complaints. The union also suggests that the CHRT is currently seized with complaints filed by many of the complainants in this matter and that the Board should therefore defer to the CHRT proceedings, as permitted by section 16(l.1) of the *Code*.

C–Air Canada

[31] Although invited to file submissions on this matter, Air Canada indicated that, as the complainants were not seeking any remedy against the employer, it would take no position on the complaint.

IV–Analysis and Decision

[32] Section 37 of the *Code* provides:

> 37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them.

[33] The complainants framed the issues before the Board as follows:

> 1. On the facts, has ACPA breached its duty of fairness to the complainants and/or is it continuing to breach its duty of fairness to the complainants, contrary to Section 37 of the *Code*?
>
> 2. By entering into the Memorandum of Agreement with Air Canada, has ACPA breached its duty of fairness to the complainants George Vilven and Neil Kelly?
>
> 3. What remedy (or remedies) is (are) appropriate vis-à-vis ACPA and/or Air Canada?

[34] ACPA endeavoured to reframe the issues as follows:

> 1. Is it a violation of s. 37 of the *Code* for the Association [ACPA] to take a position on mandatory retirement that is contrary to the wishes of some employees?
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> 2. Is it a violation of s. 37 of the *Code* for the Association [ACPA] to fulfill its duty to accommodate Messrs. Vilven and Kelly by negotiating specific terms for their reinstatement?

[35] To determine if a union violated its duty of fair representation, the Board analyses the facts according to the principles established by the Supreme Court of Canada in *Canadian Merchant Service Guild* v. *Gagnon et al.*, [1984] 1 S.C.R. 509. These principles are:

> 1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.
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> 2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.
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> 3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.
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> 4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.

> 5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.
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> (page 527)

[36] The Board does not "second-guess" the decisions made by a union, so long as the above stated principles have been observed. Consequently, a duty of fair representation complaint cannot be used as an appeal of the union's decision simply because the individual is not satisfied with the union's decision or disagrees with it. The sole role of the Board in a duty of fair representation complaint is to make an assessment of the union's conduct in handling the case. In other words, the Board rules on the union's decision-making process and not the merits of grievance (see *Fred Blacklock*, 2001 CIRB 139; *Yvonne Misiura*, 2000 CIRB 63; *Anthony William Amor* (1987), 70 di 98; and 18 CLRBR (NS) 249 (CLRB no. 633)).

A–Preliminary Issues

1–Are the Complaint and Remedy Sought Beyond the Scope of Section 37?

[37] The union has argued that portions of the complaint and the general remedy sought by the complainants is beyond the scope of a section 37 complaint, as that provision protects only an employee's rights under a collective agreement.

[38] The Board is very mindful of the extent of the scope of the duty of fair representation, and has refused to entertain complaints relating to internal union affairs such as attendance at meetings, the conduct of elections and the selection of union committee representatives (see, for example, *Yves Dumontier*, 2002 CIRB 165). However, as every collective agreement is different, in the context of a section 37 complaint the Board is obliged to examine the content of the applicable collective agreement in order to determine the rights, if any, for which the complainant is entitled to protection.

[39] Accordingly, the Board will conduct an analysis of the complaint on its merits.

2–Does the Union have a Duty to Represent Complainants who have Retired?

[40] ACPA argues that the Board should not extend the protections of section 37 of the *Code* to complainants who have retired and who are in receipt of pension benefits, as those individuals are no longer in the bargaining unit and the union has no duty to represent them.

[41] In *Tremblay* v. *Syndicat des employées et employés professionnels-les et de bureau, section locale 57*, [2002] 2 S.C.R. 627, the Supreme Court of Canada suggested that, since the union is legally mandated to represent the entire unit whose composition may vary over time, a residual duty to represent the employees who cease to work in the undertaking exists. At paragraph 21, the Supreme Court of Canada made the following observation regarding the duty of fair representation:

> 21. That duty arises from a legal mandate of representation that applies to an entire bargaining unit, the composition of which necessarily varies over time. Given the ongoing nature of that duty to all of the units, which may be in a constant state of change, it cannot be concluded that an employee's departure cancels out all consequences of the manner in which the duty of representation was carried out in respect of that employee. A legal situation may have been created such that a union will have to continue working and representing the employee in order to resolve it. It is submitted that it is especially necessary to recognize that duty, which originally derives from the manner in which the duty of representation was carried out, since the union then continues to hold the exclusive power to bargain with the employer and, most often, to control access to the grievance procedure and the conduct of that procedure. The continuation, in this form, of a residual duty to represent employees who cease to work in the undertaking, with respect to problems that arise from their period of employment, is consistent with the overall scheme of this system of exclusive and collective representation. Moreover, when carrying out its duty of representation in collective bargaining, a certified union often has to deal with the consequences of the history and problems of the group it represents. Interests may have been created, legal situations may have crystallized, commitments may have been made. In such a situation, even though the duty of representation is carried out in the present, but from the perspective of the foreseeable future of the agreement to be negotiated, the union will sometimes have to take those interests or rights into account when deciding on the approaches to which the agreement will give form and effect for the future.

[42] Accordingly, the Board will not dismiss a section 37 complaint solely on the basis that it was brought by an individual who has retired from a position in the bargaining unit represented by the respondent union. However, the extent of the duty that is owed will be examined in light of the circumstances of each case.

3–Timeliness of the Complaint

[43] ACPA argues that many portions of the complaint are untimely, given the 90-day time limit provided in section 97(2) of the *Code* for the filing of complaints. The complainants suggest that, in order for the Board to understand the context within which the complaint has been made, it was necessary to recount the history of their dealings with the union since the initial grievances regarding mandatory retirement were filed.

[44] The Board agrees that portions of the complaint that relate to a number of the specific events identified by the complainants are untimely, as they occurred more than 90 days prior to the filing of the complaint. However, in coming to a conclusion as to whether a union has violated its duty of fair representation, the Board is entitled to look at a course of conduct towards a particular member or group of members over a period of time. While a complainant is not entitled to sit on his rights indefinitely, the Board will not necessarily rule a complaint to be untimely simply because some of the alleged events occurred prior to the specific event that prompted the complaint.

4–Should the Board defer to the CHRT, as permitted by Section 16(1.1) of the *Code*?

[45] The union suggests that the CHRT is currently seized with complaints filed by many of the complainants in this matter and that the Board should therefore defer to the CHRT proceedings, as permitted by section 16(1.1) of the *Code*.

[46] While the Board has the power to defer matters when it considers that the matter could be resolved by an alternative method, the complaints that are presently before the CHRT deal with alleged violations of the *CHRA*, not the *Code*. It is the Board, not the CHRT, that is responsible for determining matters arising under the *Code*, and in particular with alleged violations of a union's duty of fair representation. As some of the complainants in this matter have been seeking a resolution of the issues affecting their personal interests for a considerable period of time, and there are a number of other similar complaints currently pending before the Board, the Board considers it appropriate to deal with this complaint in order to provide the parties with guidance for the future.

B–Merits of the Complaint

1–Did ACPA breach its Duty of Fair Representation by refusing to pursue a Grievance on behalf of the Complainants?

[47] As noted above, a union's duty of fair representation is limited to the representation of an employee's rights under the collective agreement that is applicable to that employee. In this case, the complainants did not have a right under the collective agreement to work past the age of 60; it was this very provision of the collective agreement that they were challenging. It was not discriminatory for the union to determine that the complainants were not entitled, by the terms of the collective agreement, to be treated differently than any other pilot in the bargaining unit with respect to the age of retirement.

[48] Furthermore, a union is not obliged to accept an employee's interpretation of a collective agreement provision or agree with an employee's challenge to a provision of the collective agreement. All that the Board requires, when an employee alleges that he or she has a right grounded in a human rights statute that conflicts with a provision of the collective agreement, is that the union consider the claim seriously. As the Board stated in *Gilberte Thibeault*, 2010 CIRB 505:

> [22] When an employee alleges that the provisions of a collective agreement are discriminatory, the Board expects that the union will consider the allegation objectively and honestly, and reach its own conclusion as to whether the provision does in fact discriminate on a prohibited ground or has a discriminatory effect. The union is not obliged to agree with the grievor's interpretation of the collective agreement or the CHRA, but its consideration of the allegation and its decision as to how to proceed must be taken in a manner that is not arbitrary, discriminatory or in bad faith.

[49] In the instant case, the union took the complainants' claims very seriously. It conducted surveys of its membership, commissioned studies on the issue, considered the history of the mandatory retirement provision in the airline context, the existing state of the law, and the interests of the membership as a whole. The union came to a considered decision that it could not support the complainants' case. The Board is unable to find that the union's refusal to file a grievance on behalf of the complainants was arbitrary, discriminatory or in bad faith and therefore dismisses this portion of the complaint.

2–Did ACPA breach its Duty of Fair Representation by refusing to support the Complainants' Human Rights Complaint and actively opposing their efforts to strike down the mandatory retirement provision?

[50] A union's duty of fair representation is predicated on its status as the exclusive bargaining agent with respect to collective bargaining. In *Élizabeth Buchanan*, 2006 CIRB 348, the Board commented on the applicability of section 37 of the *Code* to situations which do not implicate a union's exclusive bargaining authority, such as human rights complaints and workers' compensation matters. In that case, the complainant had alleged a breach of the duty of fair representation because the union had negotiated the settlement of a pay equity complaint it had made on behalf of the entire bargaining unit. The complainant believed the settlement was detrimental to her interests, and also alleged that the union had breached section 37 when it refused to assist her in contesting the CHRC's decision to close her individual pay equity complaint. The Board found that the union was entitled to consider the interests of the bargaining unit as a whole, as well as the interests of individual employees, and that it was not obliged to assist the employee with a complaint to the CHRC.

[51] Similarly, in *Gilberte Thibeault*, *supra*, the Board held:

> [27] Furthermore, a union is under no obligation to proceed in the manner that the complainant, or any other member, advocates; it must make its own determination as to the best method of dealing with concerns that are raised by members. Absent a requirement in the collective agreement or the union's constitution obliging it to do so, the union's refusal to file a complaint with the CHRC on the complainant's behalf does not constitute a violation of its statutory duty of fair representation.

[52] In this case, the union was under no obligation to assist the complainants with their complaint to the CHRC and the CHRT challenging the provisions of the collective agreement. Furthermore, as a named respondent, the union had every right to defend the position that it had taken before the CHRT and the courts. Indeed, having come to the carefully considered conclusion that it could not support the complainants' contention that the collective agreement was contrary to the *CHRA*, it was quite proper for the union to defend the terms of the collective agreement it had entered into, in both the CHRT and Federal Court proceedings.

[53] Accordingly, the Board can find no breach of section 37 in the union's refusal to assist the complainants with their CHRT complaint or the union's active defense of the mandatory retirement provisions of the collective agreement and therefore dismisses this portion of the complaint.

3–Did ACPA breach its Duty of Fair Representation by entering into the Interim Memorandum of Agreement with Air Canada establishing different terms and conditions of employment for George Vilven and Neil Kelly?

[54] As noted in Section II above, following the release of the CHRT decision (2009 CHRT 24) substantiating Mr. Vilven and Mr. Kelly's complaints, Air Canada and ACPA negotiated an Interim MOA in July 2010, establishing the terms and conditions under which the complainants would be reinstated in employment. Among other things, the Interim MOA provided that both Mr. Vilven and Mr. Kelly would be reinstated as Embraer First Officers at the Toronto base and that their compensation would be comprised of their monthly pension payments plus such additional monthly payments as would be required to bring their rate to that of a B777 First Officer.

[55] The complainants found the conditions contained in the Interim MOA to be unacceptable. They allege that the union acted in an arbitrary, discriminatory and bad faith manner by entering into an agreement with the employer that effectively denied or limited pilots over the age 60 from many of the rights, privileges, working conditions and employment benefits contained in the collective agreement.

[56] ACPA admits that it could simply have waited until the CHRT had issued its ruling on remedy, but argues that it was not a violation of section 37 for it to have negotiated the Interim MOA. ACPA argues that, in negotiating the Interim MOA, the union was simply fulfilling its duty to accommodate the complainants' return to the workplace. It points out that an employer and a union have wide latitude to implement appropriate accommodation measures. ACPA suggests that, without the Interim MOA or an order from the CHRT, neither Mr. Vilven nor Mr. Kelly had any right to demand reinstatement with Air Canada under the terms of the collective agreement. The arrangement was an interim one, subject to future Federal Court and CHRT decisions and/or a "global and permanent agreement" between the employer and the union to address pilots working beyond age 60. ACPA

submits that the terms contained in the Interim MOA are a legitimate compromise between the interests of the complainants and those of the other union members.

[57] The complainants argue that the union's suggestion that the Interim MOA was an "accommodation" measure is misleading, as age is not a human rights characteristic that requires accommodation. They suggest that the Interim MOA was unnecessary, as no special conditions were required in order to accomplish their reinstatement in employment.

[58] The parties' respective submissions demonstrate a lengthy history of acrimony between ACPA and Messrs. Vilven and Kelly. The Board is troubled by the evidence presented by the complainants which indicates that ACPA followed a course of conduct over a period of years that singled them out for ridicule, in particular the events at the June 2006 ACPA retirement dinner in Winnipeg, where an effigy of Mr. Vilven was mocked. The Board can in no way condone this kind of treatment by a union of any of its members, for any reason. However, while such conduct is deserving of the strongest possible condemnation, it does not constitute a violation of section 37, which is limited to the representation of an employee's rights under a collective agreement.

[59] In this case, the complainants had no right to reinstatement, under either the collective agreement or the CHRT's 2009 decision. ACPA was under no obligation to negotiate terms for their reinstatement as a result of that decision; as the CHRT pointed out in its subsequent decision on remedy (2010 CHRT 27, issued on November 8, 2010):

> [101] ...Reinstatement does not necessarily flow from a finding of liability. Further, even if reinstatement was ordered, there still remained the question of the complainant's position on the seniority list. This question is in dispute between the parties. For the respondents to await a Tribunal decision on remedy does not amount to wilful or reckless conduct.

[60] The Board has been advised that Air Canada and ACPA agreed on January 12, 2011, that the Interim MOA applicable to Mr. Vilven and Mr. Kelly was null and void, as it has been superseded by the 2010 CHRT decision on remedy. Under these circumstances, the question that was placed before the Board, as to whether ACPA breached its duty of fair representation by entering into that Interim MOA, has become moot.

[61] The Board recently had occasion to review its policy on mootness in *Canadian National Railway Company*, 2011 CIRB 572. The relevant portions of that decision read as follows:

> [13] In *Westcan Bulk Transport Ltd.* (1994), 95 di 169 (CLRB no. 1090), the Board held that its obligation to "hear and determine" complaints does not require it "to hear the merits of complaints that are moot and for which a determination would have no practical effect on the parties' rights."
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> [14] In *Borowski* v. *Canada (Attorney General)*, 57 D.L.R. (4th) 231, the Supreme Court of Canada stated:
>
> > The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. **If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision.** Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. ...
> >
> > The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Secondly, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. ...
> >
> > (page 239, emphasis added)
>
> [15] In *Atomic Energy of Canada Ltd.*, *supra*, the Board observed that the notion of mootness, as developed in the context of the proceedings of common law courts, must be applied with care in the context of proceedings before administrative tribunals. The Board went on to suggest that it should exercise its discretion to hear otherwise moot applications and complaints in a manner that supports and promotes the objectives of the *Code*, namely to encourage constructive and harmonious labour management relations.

[62] In the instant case, it is clear that the first step of the Supreme Court's analytical framework has been met: the tangible and concrete dispute between the complainants and the respondent regarding the Interim MOA has disappeared and the issue has become academic. The remedy sought by the complainants has effectively been granted by the CHRT. With respect to the second step, the Board does not consider it to be in the interests of constructive labour relations to determine an academic issue in the circumstances of this case, where the basis for the complaint involves an unsettled area

of the law. There remains considerable uncertainty in the labour relations community on the question of whether it is lawful to differentiate, with respect to terms and conditions of employment, between employees who are under and those who are over the normal age of retirement. Until the law on this subject is clarified by human rights tribunals and/or the courts, the Board is reluctant to enter into the debate. Accordingly, the Board has decided to follow its established practice and declines to rule on the third question.

[63] As the Board is unable to find that ACPA breached its duty of fair representation towards the complainants, there has been no violation of section 37 of the *Code*. The complaint is hereby dismissed.

[64] This is a unanimous decision of the Board.

Elizabeth MacPherson
Chairperson

Daniel Charbonneau
Member

Patrick J. Heinke
Member